

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of

QUALCOMM Incorporated

Petition for Declaratory Ruling

WT Docket No. 05-7

**REPLY COMMENTS**

Aloha Partners, L.P. ("Aloha"), by counsel and pursuant to the Commission's Public Notice of January 18, 2005 hereby submits its reply comments in the captioned proceeding.<sup>1</sup> By its Reply comments, Aloha reaffirms its support for the QUALCOMM's Petition for Declaratory Ruling in the captioned proceeding ("Petition"), and addresses certain misguided views espoused by certain broadcasting entities that commented in this proceeding.

Initially, it should not be lost on the reader that the majority of parties commenting in this proceeding support the QUALCOMM Petition. Aloha's review of the record shows that only three of the ten commenting parties took meaningful issue with the Petition and, notably, all were broadcasting entities.<sup>2</sup>

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<sup>1</sup> Public Notice, Pleading Cycle Established for Qualcomm Incorporated Petition for Declaratory Ruling, WT Docket No. 05-7, DA 05-87, rel. Jan. 18, 2005.

<sup>2</sup> See comments filed by The National Association of Broadcasters/Association for Maximum Service Television, Inc., Pappas Southern California License, LLC, and Cox Broadcasting, Inc. (collectively, the "Broadcasters").

The Broadcasters' first stated basis for objection is that the Commission somehow lacks authority to rule on the QUALCOMM Petition. This is the same general avenue of opposition that was launched unsuccessfully in two other recent submissions dealing with Section 27.60 of the Commission's rules.<sup>3</sup> Here, there appears to be a more fundamental misunderstanding of the QUALCOMM Petition that is at least partially behind this objection. All QUALCOMM has requested is an interpretation of existing rules. Who could be more qualified to render such an interpretation than the Commission--which Congress has repeatedly recognized to be the expert agency charged with implementing the underlying Act?<sup>4</sup> Indeed, reasonable argument can be made that the Commission is not only authorized to interpret its rules, but is charged with so doing in circumstances such as those present here.

The simple fact of the matter is that Section 27.60 is not entirely clear on its face (and, as a new rule associated with a new service, it should not have been expected to address all future potential applications.). Aloha submits that it was this very type of circumstance that the D.C. Circuit had in mind when it explained the obligations of all parties associated with rule promulgation, clarification and observance, as set forth below, years ago in *Radio Athens*:<sup>5</sup>

"The industry is correspondingly entitled to expect rules defining the required content of applications that are reasonably comprehensible to men acting in good faith. Agencies, like courts, may rightly expect attention to be accorded their interpretative

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<sup>3</sup> In the Matter of Aloha Partners, L.P. Request for Waiver of Section 27.60, *Memorandum, Opinion, and Order*, DA 05-460 (WTB rel. Feb 18, 2005); In the Matter of Access Spectrum, LLC Request for Waiver of Section 27.60, *Memorandum Opinion and Order*, DA 04-2527 (WTB rel. Aug. 12, 2004).

<sup>4</sup> 47 U.S.C. § 309.

<sup>5</sup> *Radio Athens, Inc. (WATH) v. FCC*, 401 F. 2d 398, 404 (D.C. Cir. 1968)(“*Radio Athens*”).

rulings, and the process of interpretation is never completely devoid of surprise. But agencies, unlike courts, have the capacity to issue interpretative and other regulations." <sup>6</sup>

QUALCOMM is asking only that the Commission do what Judge Levanthal explained it should do in circumstances such as this.

The Broadcasters next contend that the already-existing 2% de minimis rule should be ignored in the context of Section 27.60. Not surprisingly, no sound basis for that position has been proffered. Rather, three salient matters were conveniently overlooked. First is that the Commission's Wireless Broadband Task Force report which cogently urges that efforts be made to advance additional and more rapid access to wireless broadband, effectively endorses this type of interpretation. <sup>7</sup> Second, the Broadcasters ignore that their "apply a standard here, but not there" approach is the antitheses of reasoned administrative rule and just the type of arbitrary action that the courts frowned upon in any number of equal application proceedings. <sup>8</sup> In this regard, it is noteworthy that de minimis standards have been applied in a number of different services and are more the norm than the exception. *See e.g., Cellular Service*, 89 FCC 2nd 58 (1982)(there, the Commission permitted extensions, and therefore interference, to adjacent markets, so long as they were de minimis). Lastly, the Broadcasters' urgings ignore that the

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<sup>6</sup> *Id.* at 404.

<sup>7</sup> "Connected & On the Go: Broadband Goes Wireless, *Report by the Wireless Broadband Access Task Force*, on Docket No. 04-163, rel. March 8, 2005 (*Task Force Report*).

<sup>8</sup> *See Melody Music v. FCC*, 345 F. 2<sup>nd</sup> 730, 733 (D.C. Cir. 1965); *See also Green County Mobilephone, Inc. v. FCC*, 765 F2d 235, 237 (D.C. Cir. 1985); ( "We find that the Commission has not treated similar cases similarly.... A 'sometimes-yes, sometimes-no, sometimes-maybe policy ... cannot ... be squared with our obligation to preclude arbitrary and capricious management of [an agency's] mandate.' ") (quoting *NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (D.C.Cir.1984)).

Commission's overriding obligation is to further the public interest, which would be advanced by utilizing the de minimis rule.

QUALCOMM's last request, that streamlined processing procedures be utilized in applying Section 27.60, is so reasonable that no extensive discussion on that matter seems necessary. Suffice it to say that objections to streamlining processing appear to be protectionist to the core. Similarly, the Broadcasters' claim that 700 MHz licensees would somehow reap a windfall if Section 27.60 were clarified is extreme--especially given the fact that the Broadcasters were given spectrum free, on an interim basis, while all 700 MHz licensees paid for theirs.

For these reasons, Aloha respectfully requests that the Commission grant QUALCOMM's Petition for Declaratory Ruling.

Respectfully submitted,

**Aloha Partners, L.P.**

By \_\_\_\_\_/s/\_\_\_\_\_  
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